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July 19, 2011

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E-FILED

Cynthia Brown  
Chief, Section of Administration  
Surface Transportation Board  
Office of Proceedings  
395 E Street, SW  
Washington, DC 20423

Re: STB Docket No. AB-6 (Sub-No. 477X), BNSF Railway Company --  
Abandonment of Rail Service Easement Exemption -- In Los Angeles  
County, California

Dear Ms. Brown:

Attached for filing is the Motion for Leave to File a Response and the Response of  
BNSF Railway Company to the Replies filed by Excalibur Property Holdings, LLC  
and Mount Olive Storage, LLC.

If you have any questions, please call me.

Sincerely,

Karl Morell  
Of Counsel

ENTERED  
Office of Proceedings

JUL 19 2011

Part of  
Public Record

cc: All parties of record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. AB-6 (Sub-No. 477X)**

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**BNSF RAILWAY COMPANY  
--ABANDONMENT OF RAIL FREIGHT SERVICE EASEMENT EXEMPTION--  
IN LOS ANGELES COUNTY, CALIFORNIA**

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**MOTION FOR LEAVE TO FILE A RESPONSE**

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**RESPONSE TO REPLIES FILED BY EXCALIBUR PROPERTY HOLDINGS, LLC AND  
MOUNT OLIVE STORAGE, LLC**

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**Attorneys for:  
BNSF Railway Company**

**Dated: July 19, 2011**

**BEFORE THE  
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BNSF Railway Company ("BNSF") hereby respectfully seeks leave to file a brief response to the replies filed by Excalibur Property Holdings, LLC ("Holdings") and Mount Olive Storage, LLC ("Storage") on July 8, 2011, in this proceeding. Although the rules of the Surface Transportation Board ("Board") prohibit a "reply to a reply," 49 C.F.R. § 1104.13(c), it is within the Board's discretion to permit impermissible filings when deemed appropriate to do so. See STB Docket No. AB-6 (Sub-No. 470X) *et al.*, *BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, ILL.* (not printed), served April 26, 2011. Given the somewhat unconventional nature of the two replies, BNSF seeks leave to provide a more complete record and clarify some of the issues raised by Holdings and Storage.

**BACKGROUND**

On May 31, 2011, BNSF filed a petition with the Board seeking an exemption to abandonment of its Rail Freight Service Easement ("Freight Easement") over an approximately

4.85-mile rail line owned by Los Angeles County Metropolitan Transportation Authority ("LACMTA") and located in Los Angeles County, California (the "Line").

As explained in the BNSF petition, LACMTA desires to extend its current light rail service eastward to Azusa, CA via the corridor comprising the Line. There has been no local traffic on the Line in over two years and it is very unlikely that any local traffic will develop in the foreseeable future. Also, the Line is stub-ended and, therefore, not capable of handling overhead traffic.

### **RESPONSE**

To the best of BNSF's knowledge Holdings is the owner of a parcel of land located a few hundred feet from the Line. It is readily apparent from even a cursory review of the reply filed by Holdings ("Holdings Reply") that Holdings has no interest in this abandonment proceeding other than to obstruct the light rail project. This is, of course, not the first time an entity has attempted to use the Board's good offices to thwart a major public project. *See e.g.,* STB Docket No. AB-290 (Sub-No. 293), *Norfolk Southern Railway Company – Abandonment Exemption – In Norfolk and Virginia Beach, VA* (not printed), served November 6, 2007 ("*Virginia Beach*"); STB Finance Docket No. 35164, *BNSF Railway Company – Petition For Declaratory Order et al.*, (not printed ) served May 20, 2009 ("*Oklahoma City*").

A significant portion of the Holdings Reply addresses a pending proceeding in California state court where Holdings is challenging the Supplemental Environmental Impact Report ("SEIR") prepared by Metro Gold Line Foothill Extension Construction Authority for the light rail project. Holdings Reply at 3-10. The Board, however, does not have jurisdiction to review the SEIR because the Board does not have jurisdiction over light rail projects. Holdings erroneously argues that if the SEIR is invalidated by the state court any decision by the Board in

this proceeding would also be invalid. The Board, however, is preparing its own environmental assessment properly addressing the environmental and historic effects of the abandonment. Any invalidation of the SEIR would have no impact on the abandonment of the Line and the abandonment can go forward even if no light rail were ever constructed.<sup>1</sup>

Holdings raises a number of erroneous issues regarding the City of Monrovia ("Monrovia"). Holdings claims that the abandonment is inconsistent with Monrovia's land use plan and that Monrovia opposes the abandonment and the light rail project. Attached as Exhibit 1 is a letter from Monrovia disputing both contentions. Monrovia supports the proposed abandonment and finds it to be fully consistent with its current land use regulations.

Holdings arguments regarding the Rail Transportation Policy at 49 U.S.C. § 10101 ("RTP") are nonsensical. The RTP is not applicable to light rail construction projects and the Board is fully complying with NEPA as it applies to this abandonment.

Equally nonsensical is Holdings contention that BNSF is turning the Line "into an active Gold Line line...." Holdings Reply at 13. BNSF will have no involvement in the construction of the light rail system. BNSF is simply abandoning its freight easement over a rail line it does not own. Thus, the transaction before the Board (the abandonment of the Line) is limited in scope.

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<sup>1</sup> Holdings mistakenly argues that BNSF is relying on the SEIR for its environmental clearance from the Board. While BNSF has submitted very small portions of the SEIR, BNSF has prepared its own Environmental and Historic Reports which will form the basis for the environmental review in this proceeding. Holdings also claims that there has been no review of the project under the National Environmental Policy Act ("NEPA"). Whether the light rail project is subject to NEPA review is a matter for another tribunal to decide. The Board, in preparing an environmental assessment for the proposed abandonment, is in full compliance with NEPA. See 49 C.F.R. § 1105.6 (b)(2).

Holdings argues that the "proposed abandonment is more environmentally significant than a typical proposed abandonment" because the Line will be converted to passenger rail service. Holdings Reply at 14. The Board, however, routinely grants abandonments where the corridor will be used for other public purposes. See e.g., *Virginia Beach* (public transit); *Oklahoma City* (highway project); STB Docket No. AB-33 (Sub-No. 265X), *Union Pacific Railroad Company – Abandonment and Discontinuance of Trackage Rights Exemption -- In Los Angeles County, CA* (not printed), served December 16, 2008 (light rail"). In all of these proceedings and many others, the Board limited its environmental review to the abandonment. The Board has not, and may not, engage in the environmental review of the subsequent highway or public transit construction project.<sup>2</sup>

Finally, Holdings seeks to have the Board stay or deny the petition on grounds BNSF did not "promptly" make available information on federally granted rights-of-way. By letter dated June 30, 2011, Holdings requested all documentation in BNSF's possession pertaining to federally granted rights-of-way. The requested documents were forwarded to Holdings on July 11, 2011. BNSF had information readily available identifying federally granted rights-of-way along the Line, but because Holdings requested "all" documentation in BNSF's possession the files in three different BNSF offices as well as the files of a BNSF contractor needed to be searched to ensure that BNSF was in full compliance with request. Under these circumstances, BNSF considers its response as prompt.

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<sup>2</sup> Holdings alleges that BNSF did not serve its petition on all interested parties. The service of the petition is in full compliance with the Board's regulations at 49 C.F.R. § 1152.60 (d). In this regard, Holdings identifies Miller/Coors as an entity BNSF should have contacted. Miller/Coors is a customer of BNSF whose service will not be affected by the abandonment of the Line.

In any event, Holdings fails to explain the relevance of this information to any possible issue it could have raised in this proceeding. Holdings is not an adjacent landowner and it has no reversionary interests in any federally granted rights-of-way. Holdings is simply on a fishing expedition with the aim of delaying or derailing this proceeding for the sole purpose of delaying the construction of the light rail project.

While the motivations of Storage are not as readily apparent as those of Holdings, the arguments are equally unavailing. Storage seeks a hearing in this proceeding so that it can present evidence on the effect this abandonment will have on the value of Storage's land. But the effect an abandonment has on land values of entities, particularly entities that are not receiving service by rail, is a totally irrelevant issue in abandonment proceedings. In other words, Storage seeks a hearing in this proceeding for the sole purpose of submitting to the Board totally irrelevant information.

The statutory standard governing an abandonment or discontinuance of service is whether the present or future public convenience and necessity permit the proposed abandonment or discontinuance. 49 U.S.C. § 10903 (d). In implementing that standard, the Board must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. *Colorado v. United States*, 271 U.S. 153 (1926).

BNSF has searched its records and is unable to determine when, if ever, Storage last utilized rail service. The switch and spur leading to Storage's property have long been removed. See Exhibit 2. Nor does Storage hold out any prospect of using rail service in the future.

In support of its novel request, Storage claims that "Congress specifically intended to protect landowners from monopolistic or collusive action by railroads and to ensure that the

deprivation of property rights for the common good is accompanied by all the protections of due process.” Storage Reply at 5. Storage cites no legal authority for this bold statement because, of course, there is none. No provision of the RTP or 49 U.S.C. § 10903 applies to an entity that does not use rail service but is simply a landowner near a rail line. In any event, the proposed abandonment is neither a monopolistic nor collusive action by BNSF and the proposed abandonment will not deprive Storage of any property rights.

Storage’s contention that the proposed transaction is not of limited scope is illölogical. A 4.85-mile rail line in Los Angeles without any rail customers is no different than a 4.85-mile rail in the Nevada desert without any rail customers. In any event, BNSF cannot possibly abuse any market power since there are no active shippers on the Line.



## **CONCLUSION**

The attempt by Holdings to interject the Board in the light rail project should be summarily denied. Storage's attempt to delay this proceeding so that it can introduce totally irrelevant information should similarly be denied. Under these circumstances, BNSF respectfully urges the Board to grant the requested exemptions.

Respectfully submitted,



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Dated: July 19, 2011



July 13, 2011

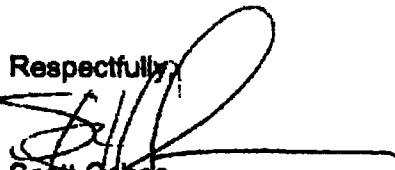
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423-0001

**RE: Support for STB Approval of BNSF Freight Abandonment - STB Docket No. AB-6 (Sub-No.477X)**

The City of Monrovia urges the Surface Transportation Board ("STB") to approve BNSF Railway Company's ("BNSF") request to abandon right-of-way from Arcadia to the San Gabriel River Bridge, within the Metro Gold Line Foothill Extension Pasadena to Azusa project area.

BNSF has petitioned the STB for permission to abandon freight service in this segment, and the City supports that decision. In addition to no rail freight customers being located along the segment (BNSF has not handled freight traffic for over two years), abandonment supports the City's current land use regulations which encourages transit-oriented-development and does not support freight rail-served uses.

The City of Monrovia urges the STB to expedite approval of BNSF's request to abandon this right-of-way.

Respectfully,  
  
Scott Odjida  
City Manager

